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LEGAL CORNER



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Avoidable Litigation

The Appeals Court issued an unpublished decision at the end of October in a case where costly litigation could have been avoided.

The case arose out of a public construction project. The millwork subcontractor asserted claims against the general for additional compensation. The sub's time for completion was a major issue at trial and on appeal.

The general contract included a "time is of the essence" clause and provided that the project had to be substantially complete within 540 days of the town's issuance of a notice to proceed to the general.

The general sent a letter informing the subcontractor that it was being awarded a subcontract, and the parties executed the subcontract three weeks later.

The subcontract did not include a specific completion date, but required completion with "due consideration" to the time specified by the awarding authority for completion of the entire project. In a separate letter bearing the same date as the subcontract, the general referenced the "time for completion" as "540 days."



As a result, there were three possible deadlines for the sub to complete its work: (1) 540 days from the notice to proceed; (2) 540 days from the general contractor's notice that it intended to award a subcontract to the sub; and (3) 540 days from the date of the subcontract.

532 days after the parties executed the subcontract, the general contractor hired a different firm to produce a major item that the sub was contracted to supply. The sub filed a lawsuit contending that it had 540 days from the date of the subcontract to complete its work, and claiming that before the general could switch suppliers, it had to give notice under the subcontract. At trial, the subcontractor testified that it was capable of producing the item within the 540 day time period.

Calculating the 540 day time period from the date of the town's notice to proceed, the trial court rejected the subcontractor's position. Since the sub hadn't completed its work by this earlier deadline, the court concluded that the general was not obligated to give

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notice to the sub before switching suppliers.

The Appeals Court upheld this decision on appeal. The court rejected the sub's calculation of the 540-day completion period from the date of the subcontract as unreasonable, because it would allow essential components of the project to be completed weeks after the substantial completion date for the project as a whole. The Appeals Court also concluded that the subcontractor's calculation was contrary to the terms of the subcontract requiring the sub to complete its work with "due consideration" to the time for completion of the entire work.

The result is that, although the subcontract did not make the deadline clear, did not specifically incorporate the general contract's substantial completion deadline by reference, and included only a vague reference to the time for completion of the entire project, the court held the subcontractor to the substantial completion deadline spelled out in the general contract.

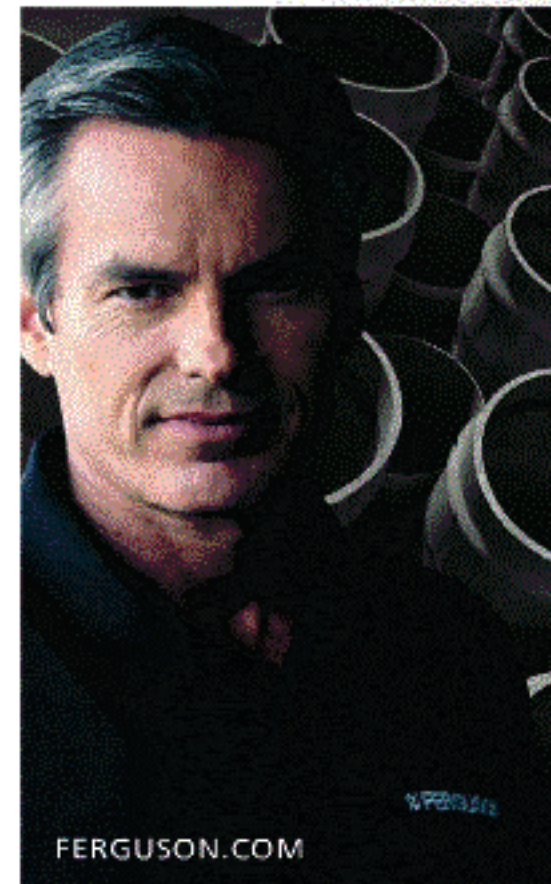
It is not clear from the Appeals Court's decision whether the subcontractor tried to confirm its completion date with the general. The sub might have avoided timing problems if it had. It may be that the sub thought its "540-day" deadline was clear. But the Appeals Court held that the subcontractor's interpretation of the

deadline was unreasonable in light of the deadline for substantial completion of the project as a whole. This timing issue was fatal to the subcontractor's position.

There are two practical takeaways from this case.

The first is a fresh reminder that deadlines matter, especially in Massachusetts where the courts can be very strict on timing and notice issues. The court applied a strict interpretation as to timing here, holding the subcontractor to a deadline that wasn't clearly identified in the subcontract.

The second is to use clear and complete subcontracts. Doing so can be an effective litigation avoidance tool. While the general contractor ultimately prevailed in this case, it was only after experiencing and managing litigation, at the trial court level and on appeal. This time-consuming and costly litigation likely could have been avoided if the subcontract included a specific completion date. ■



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